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Supreme Court of the United States

October Term, 1948

No. 156
No. 49 MISCELLANEOUS

MARGARET C. DONOVAN,

Petitioner,

against

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

RESPONDENTS' ANSWER OPPOSING PETITION FOR REHEARING

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SUBJECT INDEX

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POINT I. As we showed in opposition to the former application, that petition and motion were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was not previously presented here, and is not now presented here 3

POINT II. Furthermore, the plaintiff never presented any case within the settled rules for the issuance of a writ of certiorari.

The District Court's order of November 24, 1947, was not final. At the plaintiff's own request it was made merely tentative and subject to the plaintiff's right to move in the District Court for "the modification or vacation thereof" upon further matters of fact or of law or of argument.

The plaintiff has never availed herself of the provisions and remedies which she herself caused to be inserted for her own benefit in the order of the District Court 4

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Six months after the plaintiff's petition for a writ of certiorari was denied on October 11, 1948, she now petitions for a rehearing on the asserted ground that this Honorable Court had, on February 28, 1949, granted a writ of certiorari in the case of *Cohen* v. *Beneficial Industrial Loan Corporation*, 170 F. 2d 44.

The respondents oppose the present petition on the same grounds as they urged in their Brief in opposition to the former petition.

The respondents further show (1) that the situation and the controlling facts in the present case are, as shown in Points I and II, *post,* altogether different from those in the *Cohen* case; (2) that the plaintiff's present petition for rehearing does not acknowledge the existence of these controlling differences but attempts an argument *in vacuo;* and (3) that there is no conflict between the decision of the United States Court of Appeals for the Second Circuit in the present case and the decision of the United States Court of Appeals for the Third Circuit in the *Cohen* case.

The controlling differences in the present case are:

1. The plaintiff's original petition and motion in this Court were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was never presented to this Honorable Court in connection with the former petition for a writ of certiorari, and is not now presented.

The respondents urged this consideration in Point I II (p. 6) of their former brief in this Honorable Court. They now present it again in Point I, *post.*

2. In no event could the order of the District Court in the present case be considered as final.

At the plaintiff's own request, it was made tentative and she was therein given an opportunity to "obtain the modification or vacation" thereof,—a privilege which she has never exercised since that order was entered as far back as November 24, 1947.

The respondents urged these considerations in Point II (p. 6) of their former brief in this Honorable Court. They now present them again in Point II, *post.*

POINT I

As we showed in opposition to the former application, that petition and motion were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was not previously presented here, and is not now presented here.

The only record presented to this Court is the record of the following proceedings in the United States Court of Appeals:

1. Notice of motion and affidavit to dismiss the appeal;
2. Two affidavits in opposition;
3. Order dismissing the appeal;
4. Petition for rehearing and certification of questions;
5. Order denying such petition.

The District Court's order of November 24, 1947, (which is the order from which the petitioner attempted to appeal) is in the record solely as Exhibit "B" attached to the defendants' motion for dismissal in the Court of Appeals.

That order recites, as the record on which it was based: the amended complaint, the notice of motions to dismiss the amended complaint or, in the alternative, for security for expenses, the affidavit of Charles H. Tuttle in support of such motions, various exhibits attached thereto, and the affidavits of Edward F. Clark and Margaret C. Donovan in opposition.

None of these papers is in the record formerly or now presented to this Court.

On this record, therefore, it would not be possible to review that order or the order of the United States Court of Appeals dismissing the appeal therefrom.

The refusal of the Court of Appeals to grant a rehearing or certify questions was purely discretionary and presents nothing for consideration by this Honorable Court.

POINT II

Furthermore, the plaintiff never presented any case within the settled rules for the issuance of a writ of certiorari.

The District Court's order of November 24, 1947, was not final. At the plaintiff's own request it was made merely tentative and subject to the plaintiff's right to move in the District Court for "the modification or vacation thereof" upon further matters of fact or of law or of argument.

The plaintiff has never availed herself of the provisions and remedies which she herself caused to be inserted for her own benefit in the order of the District Court.

(1) This action by the petitioner as plaintiff was brought in the United States District Court for the Eastern District of New York, allegedly in a derivative right as the holder of a voting trust certificate for 111½ shares (2.35%) of the outstanding capital stock of the defendant, Garden Housing Corporation. She demanded a receiver and an accounting (R. p. 2).

On October 10, 1947, the defendants moved to dismiss the amended complaint and, in the alternative, that the plaintiff be required, under Sections 61(b) and 64 of the

General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which might be incurred by that corporation and by the other parties-defendant in connection with the action, and that, pending the deposit of such security, further proceedings on the plaintiff's part be stayed (R. p. 2).

On November 17, 1947, the Court (Judge Inch) delivered an opinion denying the motion to dismiss but granting the alternative prayer for security in the sum of $50,000 (R. p. 4).

On November 24, 1947, the District Court entered on this decision an order, the directing portions of which read as follows (R. pp. 9-11):

> "Ordered, that the motions by the defendants to dismiss the complaint be and the same hereby are denied; and it is further
>
> Ordered, that the motion by the defendants for security be and the same hereby is granted, and the plaintiff be and she hereby is required, pursuant to the provisions of Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant Garden Housing Corporation security satisfactory to this Court in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which may be incurred by said Garden Housing Corporation and by the other parties defendant in connection with this action, for which said Garden Housing Corporation may become subject; and it is further
>
> Ordered, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the*

modification or vacation thereof be and the same hereby are stayed; and it is further

Ordered, that the time for the defendants to move to or answer the amended complaint herein be and the same hereby is extended 20 days after the deposit of the aforesaid security by the plaintiff with notice to the defendants." (The italics are ours.)

The words italicized were inserted *at the request of plaintiff's counsel* on the settlement of the order.

These words were intended by the plaintiff's counsel to keep the door open, and by the court as an invitation, for the plaintiff to come back to the District Court with further matters of fact or of law or of argument if she so desired.

On November 28, 1947, instead of availing themselves of the opportunity which they and the court had thus reserved to them, the plaintiff's attorneys moved to add to this order a provision that, in the event the required security were not given within ten days, the amended complaint be automatically dismissed (R. p. 3).

This motion was denied by the Court with the following memorandum (R. p. 3):

"Dec. 12, 1947
This motion is denied.
I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me. That was all before the Court as I had denied the motion to dismiss the complaint on the grounds urged by the defendant and ordered security to be furnished. Anything else, such as a new motion to dismiss must await a motion by defendant if and when made.

Robert A. Inch."

The order of denial was dated December 19, 1947 (R. pp. 3, 11).

On December 24, 1947, the plaintiff served a notice of appeal to the Court of Appeals for the Second Circuit from the aforesaid order of November 24, 1947, and from the aforesaid order of December 19, 1947 (R. p. 13).

The defendants thereupon moved in the Court of Appeals to dismiss the appeal "because the orders sought to be reviewed are not final decisions and are not appealable" (R. pp. 1-4). On March 23, 1948, this motion was unanimously granted, without opinion (R. p. 23).

Subsequently, the plaintiff petitioned the Court of Appeals for a rehearing or, in the alternative, for a certification of alleged questions to this Court (R. pp. 24, 29). This petition was denied, without opinion, by order entered April 16, 1948 (R. p. 35).

The plaintiff then petitioned for a writ of certiorari to the Court of Appeals or, in the alternative, for a writ under Section 262 of the Judicial Code. This petition was denied by this Honorable Court on October 11, 1948 (*Law ed. Advance Opinions*, Vol. 93, p. 26).

(2) As set forth above in the Preliminary Statement, the District Court, in settling its order of November 24, 1947, accepted the counter-form proposed by the plaintiff's own counsel who successfully urged that, for her benefit, there should be included in the directive portion the following words which we italicize (R. pp. 3, 16):

> "ORDERED, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed."

The plaintiff has never availed herself of this saving clause sought and obtained by her for her own relief and benefit. In asking for it, she impliedly represented her intention to use it. The fact, however, is that she has never presented to the District Court an application for a reconsideration or any new matter of fact or of law or of argument for the modification or vacation of the order or of the security thus ordered only tentatively.

Instead, on November 28, 1947, she moved the District Court for the addition of a further provision that, in the event that the security be not furnished within ten days, the amended complaint be automatically dismissed. This motion was denied (R. p. 3). The granting of it would have enabled the plaintiff herself to achieve automatically the very dismissal which she herself had opposed and which the District Court had refused, by the simple stratagem of not complying within ten days with the requirement for security. In denying this motion, the District Court said (R. p. 3):

> "I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me."

(3) Furthermore, notwithstanding this express invitation by the District Court to the plaintiff, she once again deliberately omitted to avail herself of the opportunity for relief thus held open to her for a second time by the District Court,—and this notwithstanding that in their affidavit in opposition to the defendants' motion to dismiss her ensuing appeal, the plaintiff's counsel acknowledged that they recognized that this second invitation by the District Court was "an intimation" of a "possible reconsideration of the amount of security" (R. pp. 17, 18).

(4) For these several reasons, the order of November 24, 1947, was in no sense final even as a temporary deter-

mination. It was merely tentative, and was twice expressly held open by the District Court for reconsideration by it if the plaintiff would move therefor.

The plaintiff should have exhausted her opportunities in the District Court before attempting to appeal from an order which on its face and at her request was merely tentative and not final against her.

In consequence, the Court of Appeals had, in no event, jurisdiction to entertain an appeal therefrom while these remedies and opportunities were still available to the plaintiff in the District Court and were still unavailed of by her.

Like considerations were previously, and are now again, applicable in this Honorable Court.

(5) Parenthetically, it is noteworthy that the plaintiff's attorneys are, admittedly, themselves the real parties in interest,—"the beneficial owners" of the trust certificate (R. pp. 16, 17, 22).

The plaintiff states that she is not able to furnish the security (R. p. 17); but there is no such statement by her attorneys,—the real parties in interest (R. p. 22). They merely say that they are unwilling to "wager" such a sum "on the outcome of the suit" (R. p. 22). But they are perfectly willing to force the defendant Garden Housing Corporation to "wager" such a sum through the operation of Section 61(b) and 64 of the General Corporation Law of the State of New York; although they are unwilling to give it any security as against such enforced "wager".

The petition for rehearing should be denied.

Dated, April 9, 1948.

Respectfully submitted,

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